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No. 90-1598

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IN THE

Supreme Court of the United States

October Term 1991

LAWRENCE J. KORB,

Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

CASES — PAGE

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Benson v. Scott, 734 F.2d 1181 (7th Cir.) cert. denied, 469 U.S. 1019 (1984) 6

Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983) 8, 9

Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) . . . 5

Korb v. Raytheon Corp., 410 Mass. 581, 574 N.E.2d 370 (1991) 4

Mt. Healthy Sch. Dist. Board of Ed. v. Doyle, 429 U.S. 274 (1977) 5

Perry v. Sindermann, 408 U.S. 593 (1972) 6

Pickering v. Board of Ed., 391 U.S. 563 (1968) 6

Rankin v. McPherson, 483 U.S. 378 (1987) 6

CONSTITUTION

U.S. Constitution, Amendment I . . passim

RULES

Fed. R. Civ. P. 56 4

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1. Respondents contend that the legal issues raised by petitioner are precluded by factual findings of the

lower courts and, accordingly, that this case is not an appropriate vehicle for addressing the substantive question presented by the petition. Pyatt Br. at 7-8. The contention is incorrect. This case comes up on a motion to dismiss in which petitioner's allegations in his amended complaint must be taken as true. Those allegations include that respondents called Raytheon with the intention of silencing further criticism by petitioner of the proposed defense budget and that the respondents' actions caused Raytheon to fire petitioner.

The defendants filed a motion to dismiss or in the alternative for summary judgment arguing that they were entitled to qualified immunity based on plaintiffs' allegations and that their actions did not cause Korb's firing. Based solely on the allegations of the

complaint, the district court held that defendants were entitled to qualified immunity. 12a, 43a, 50a. On the causation issue, however, the district court, without addressing Korb's assertion in opposition to summary judgment that he had been denied all opportunity for discovery and that the material facts were in dispute, granted summary judgment. 51a-53a; see Pyatt Br. at 7-8.

The Court of Appeals did not review this finding on causation, but confined itself to ruling on the qualified

immunity issue. 14a.[1] Thus, only petitioner's allegations, not the lower courts' "findings," are properly before this Court.[2]

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[1] The Court of Appeals' opinion, although not a model of clarity, cannot fairly be read as having "found the undisputed facts." Lehman Br. at 2, n.1. That decision rests solely on the holding that the defendants' alleged conduct did not violate any clearly established right of Korb's. 12a, 18a. The decision never discussed the required findings under Rule 56 to resolve asserted factual disputes. See Pet. at 14 n.3.

[2] Petitioner notes however, that even on the present undeveloped record, the evidence is sufficient to entitle him to a trial of the factual issues. Respondents themselves admit that they called Korb's employer to object to his statements about the proposed budget with the hope that Raytheon would silence him, and that he was then fired. See also Korb v. Raytheon Corp., 410 Mass. 581, 584, 574 N.E.2d 370, 373 (1991) ("Raytheon officials told Korb that he would be terminated from his position . . . because of the Navy, Air Force, and Armed Services Committee objections"). This evidence alone is sufficient to support a jury inference that respondents called Korb's employer with the intent to retaliate against him for his speech and thereby caused him damage. The Inspector (continued...)

2. Respondents' opposition to certiorari also rests on a misstatement of petitioner's legal claim. The issue on which Korb seeks certiorari is whether, in 1986, he had a clearly established right to be free from government induced employment sanctions in retaliation for his speech about the proposed defense budget. Prior to 1986, this Court had repeatedly held that employment sanctions for such protected speech were unconstitutional.[3]

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[2](...continued)
General agreed that the defendants intended improperly to silence Korb, he specifically found that "these Navy officials believe that it is wrong for Defense contractor executives to speak in opposition to a position taken by the DoD" and that they acted on this belief.

[3] Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979)(dismissal of public school teacher for criticism of school policies as discriminatory violates First Amendment); Mt. Healthy Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 283-84

(continued...)

Although, prior to 1986, there was no case holding that government officials may not use employment sanctions against a private employee as punishment for protected speech, there were many such

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[3](...continued)
(1977)(decision not to rehire teacher because of teacher's constitutionally protected speech in publicizing school memorandum violates First Amendment); Perry v. Sindermann, 408 U.S. 593, 598 (1972)("reaffirming" that non-renewal of non-tenured public school teacher's one-year contract may not be predicated on exercise of First Amendment rights); Pickering v. Board of Ed., 391 U.S. 563, 574-75 (1968)(dismissal of teacher for public criticism of school board violates First Amendment); see Benson v. Scott, 734 F.2d 1181, 1185 (7th Cir.) cert. denied, 469 U.S. 1019 (1984)(employees' right to be free from retaliation for exercise of their First Amendment rights has been clear since at least 1968); see also Rankin v. McPherson, 483 U.S. 378, 392 (1987)(discharge of constable's employee for comment about assassination of the President violates First Amendment). This Court has recognized that "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin 483 U.S. at 383.

cases holding that employment sanctions may not be imposed against a public employee. A fortiori, those cases prohibit government use of employment sanctions against private employees for protected speech because the government has no countervailing interest as employer. See Pet. at 25 n.6. This Court should grant certiorari to make clear the important principle that such a fortiori applications of prior decisions constitute clearly established law. Compare the Court of Appeals opinion at 20a-22a.

Thus, contrary to respondents' contention, petitioner does not claim some general right to be free of adverse commentary by government officials on his "integrity, competence, judgment, or discretion." Pyatt Br. at 9. As contemplated by Anderson v. Creighton,

483 U.S. 635 (1987), petitioner has framed his constitutional right in narrow and specific terms -- the right to be free of government action intended to silence or punish his protected speech. Respondents' discussion of the broader category of "adverse commentary" is simply not relevant.

3. For like reason, Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983) is irrelevant. It does not hold that a private sector employee has no clearly established "First Amendment right -- to criticize government officials without suffering adverse employment consequences" through official retaliation.[4] Pyatt Br. at 9. This

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[4] Even if Donohoe had held that private employees had no clearly established right to be free of official retaliation for protected speech through (continued...)

specific First Amendment right was not at issue in Donohoe. That court addressed only the "right to have one's entirely volitional unsolicited personal correspondence to a government official kept secret from anyone including his employer." 546 F. Supp. at 756. In Donohoe government officials transmitted "plaintiff's correspondence to his private employer for informational purposes," which the court characterized as "communicat[ing] freely with enterprises having business with the department, including . . . offer[ing] adverse commentary upon the integrity, competence, judgment, or discretion of their representatives." Id.

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[4](...continued)
employment sanctions, a district court opinion could not make unestablished what prior decisions of this Court had established.

4. Finally, Korb is not seeking an advisory opinion or asking this Court to clearly establish a right for future cases that is not already established. See Lehman Br. at 16-17. To the contrary, this specific right was clearly established before Korb's termination and the Fourth Circuit's decision in this case. That decision, however, clouds the existence of the right and thus undermines its protection for future victims of governmental coercion. Granting the writ will not only remedy Korb's constitutional wrong, it will restore for others this important constitutional protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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